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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 560

EDWARD E. COLTON and LILLIAN KALTMAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

EDWARD E. COLTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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GEORGE G. GALLANTZ,
JON H. HAMMER,
Of Counsel.

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the order of the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 201 F. Supp. 13 (S.D.N.Y. 1962). A motion to dismiss the appeal from the District Court was denied by the Court below on June 21, 1961. 291 F. 2d 487 (2d Cir. 1961). The opinion of the United States Court of Appeals for the Second Circuit, decided July 30, 1962, is reported at 306 F. 2d 633 (2d Cir. 1962).

Jurisdiction

The appeal to the Court of Appeals for the Second Circuit was decided July 30, 1962. The mandates duly issued to the United States District Court for the Southern District of New York on August 15, 1962. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. May a Special Agent of the Internal Revenue Service engaged in attempting to gather evidence to support a criminal prosecution against a taxpayer utilize the taxpayer's consultation with counsel to provide evidence of an alleged crime?

2. May a Special Agent of the Internal Revenue Service in attempting to gather evidence to support a criminal prosecution against a taxpayer compel the taxpayer's legal counsel to disclose information concerning the specific details of services performed by him?

3. May a Special Agent of the Internal Revenue Service, in attempting to gather evidence to support a criminal prosecution against a taxpayer, obtain information from the taxpayer's counsel concerning his consultation with

the client when the mere facts and dates of consultation will constitute a prejudicial judicial disclosure?

(a) Would such a result unduly and improperly restrict the scope of the attorney-client privilege so that the basic public policy and purpose of such privilege is defeated?

Statement

Edward E. Colton, Esq., one of the petitioners is an attorney at law having been admitted to the bar of the State of New York in 1928. He is also a member of the bar of the United States District Court for the Southern District of New York. He has practiced law continuously since 1928 and is now the senior partner in the firm of Colton, Gallantz & Fernbach, Esqs., with offices for the practice of law at 745 Fifth Avenue, New York, N. Y. Prior to 1958 he was engaged in the individual practice of law with two employed associates (App. 52a).*

Lillian Kaltman, Esquire, one of the petitioners is also an attorney at law having been admitted to the bar of the State of New York in 1940. She has been associated with the firm of Colton, Gallantz & Fernbach, Esqs., as an attorney since in or about the month of February, 1959 (App. 33a, 53a).

Neither Mr. Colton nor Miss Kaltman is an accountant, nor are any of their partners or associates accountants. All partners and associates are attorneys at law engaged in general practice (App. 53a).

Herbert and Mercedes Matter are clients of the Colton firm and before that of Mr. Colton individually. Mr. Colton and, later his law firm, have performed general legal services for Mr. and Mrs. Matter for a number of years starting sometime in the early 1940's. Included in the

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* Parenthetical references are to the appendix in the Court of Appeals.

broad spectrum of legal work which petitioners have performed for Mr. and Mrs. Matter has been the preparation of income tax returns for some years (App. 4a, 53a).

Herbert Matter is an artist and photographer noted here and abroad for the generally creative character of his work (App. 53a).

Morton L. Leavy, Esq., whose name appears in the Appendix is an attorney at law who was associated with Mr. Colton until 1958 (App. 53a).

On or about July 29, 1960, Internal Revenue summonses (App. 8a-11a) were served upon the petitioners Edward E. Colton, Esq. and Lillian Kaltman, Esq., requiring them to appear before Anton Kurtzuk, a Special Agent of the Internal Revenue Service, to give testimony relating to the tax liability of Mr. Colton's clients, Herbert and Mercedes Matter, for the years 1951 through 1958, and to produce books, records and papers specified therein. Special Agent Kurtzuk informed Miss Kaltman that he wished to question the attorneys about the reasons which the taxpayers gave their counsel for filing certain tax returns late (App. 53a). He stated that he sought to know what caused the taxpayers to come forward and file returns, as the taxpayers may have disclosed such information to their lawyers. Since it appeared that the subject matter of Kurtzuk's inquiry would (if such communications were had) induce a violation of the attorney's duty to the taxpayers arising out of the relationship of attorney and client, an adjournment was obtained to enable petitioners to consult with their clients to determine whether there would be a waiver of the attorney-client privilege. On being informed that there would be no waiver (App. 5a, 54a, 81a), an application was made to the United States District Court for the Southern District of New York to quash or modify the summonses (App. 2a-11a) since petitioners, as attorneys, felt bound by law and the Canons of Ethics to hold sacred the confidential relationship between attorney and client.

Kurtzuk is a Special Agent of the Internal Revenue Service whose duty and function it is to gather evidence to support a criminal charge against the taxpayers (App. 5a, 54a). There is no issue with respect to non-privileged matter. Petitioners have offered on more than one occasion to give testimony relating to the mathematical computation of the items appearing on the income tax returns (App. 5a, 28a, 29a, 54a, 78a).

Prior to the return date of the application to quash or modify the summonses, a stipulation was entered between counsel for petitioners and the United States Attorney for the Southern Distri of New York providing for petitioners' appearance in the form of compliance with the summonses prior to the return date (App. 12a). It was the intention of counsel for both sides to see whether the issues might not be resolved by the appearance and testimony (App. 12a, 54a, 55a). The transcript of the testimony as given on November 23, 1960 by Miss Kaltman appears at pages 33a, *et seq.*, of the appendix and by Mr. Colton at pages 13a, *et seq.*, of the appendix.

At this appearance, they responded to all questions they considered not to be in violation of the attorney-client privilege. They further expressed their willingness to testify on further subjects not protected by the privilege including the mathemtical computation of the returns (App. 28a, 29a). The Special Agents, however, indicated an unwillingness to inquire into such unprivileged areas.

On February 28, 1961, the application came on to be heard before the Hon. Archie O. Dawson, United States District Judge for the Southern District of New York, who summarily denied the motion to quash or modify, without opinion, stating from the bench, however, that the attorney-client privilege applied so as to limit the effect of the summonses. Thereupon the appellants filed a notice of appeal to the Court of Appeals for the Second Circuit (App. 41a). After the notice of appeal was filed the In-

ternal Revenue Service served a second summons on Mr. Colton alone (App. 59a, 60a), requiring him to appear before Special Agent Kurtzuk for purposes identical to the first summons although the language of the summons excluded privileged matter from its scope. The Internal Revenue Service then moved to dismiss the appeal then pending on the three grounds that the District Court lacked jurisdiction of the motion to quash, that Judge Dawson's order was neither final nor appealable and that the appeal had been rendered moot by the intervening service of the second summons.

In its decision of June 21, 1961, the Court below denied the motion to dismiss and ruled for the petitioners on all three objections. *Application of Colton,* 291 F. 2d 487 (2d Cir. 1961).

On March 24, 1961, petitioner Colton appeared before Special Agent Kurtzuk in response to the second summons and again pleaded the client's privilege as to those questions that would cause him to breach his duty of confidentiality. The transcript of the March 24, 1961 examination which appears at pages 61a, *et seq.* of the appendix clearly demonstrates an attempt to encroach upon the same privileged area violated in the first examination conducted on November 23, 1960. As the Court below aptly observed:

> "There has been no disclaimer by the Service of its intention to require Colton to appear and produce books and records which he considers himself forbidden to do by the attorney-client privilege." (291 F. 2d at 492)

The position of the attorney-appellants is best expressed by the following language of petitioner Colton himself:

> ". . . On both occasions I tried to the best of my ability to answer all questions which I believe in

good conscience to be outside the scope of the privilege which was asserted by my client. Wherever I declined to answer a question it was based upon my belief that such question should be not answered because of my sacred obligations under the law and the Canons of Ethics as an attorney-at-law. It should be absolutely clear that I am a disinterested party, having no interest, financial or otherwise, whatsoever in the outcome of the investigation now being conducted of my clients. I do, however, feel that I am in the position of a moral stakeholder and that it has fallen to me to uphold the Sacred tradition of our Bench and Bar against this attempt by the Internal Revenue Service to erode the protected relationship between attorney and client. If it is the tradition and policy that persons are to be encouraged to consult counsel freely, openly and fully, when faced with problems, then the Internal Revenue Service should be halted in their attempts to forge a link in the chain of criminal evidence from the act of consultation between attorney and client which it is universal policy to protect. There should be no doubt that Special Agent Kurtzuk seeks to short cut the arduous route of investigation by obtaining the evidence he feels he may need from the attorney for the person whom he is investigating. Such an approach undoubtedly would lighten his task but it runs fundamentally counter to the basic traditions and values of the society for which his government agency has the duty to provide financial support. In the last analysis our society comes first. Vigilance is the key to its preservation." (App. 56a, para. 10)

Nevertheless, the Internal Revenue Service moved in the District Court for an order requiring Mr. Colton to answer the questions to which objections had been made at the second examination (App. 46a-49a). The appli-

cation was granted by the Hon. Charles M. Metzner, United States District Judge for the Southern District of New York, in a lengthy decision entered December 28, 1961 (App. 82a-89a), which in effect, directed Mr. Colton to answer every question to which an answer had been declined. 201 F. Supp. 13 (S.D.N.Y., 1962). The decision, however, does indicate a modified form of answer to be made with respect to certain of the questions (App. 88a-89a).

On January 17, 1962, appellant Colton filed a notice of appeal to the Court below (App. 90a). The appeals were consolidated by stipulation.

The decision of the Court of Appeals handed down July 30, 1962 is in direct conflict to the decision of the Court of Appeals for the Ninth Circuit in *Baird* v. *Koerner*, 279 F. 2d 623 (9th Cir., 1960).

It is the contention of the petitioners that the decision of the Court below was erroneous in that it thwarted and frustrated the basic public policy underlying the attorney-client privilege.

The decision below is important in affecting the area of the proper administration of the Federal criminal law. If the attorney-client privilege is to be arbitrarily and artificially restricted and curtailed as a result of legal niceties, they very result created by the decision below, the legal profession will be severely hamstrung in its representation of clients. The interests of the latter will not accordingly be given proper representation in the area of the Federal criminal law. This case, therefore, presents a notable opportunity for this Court to express an opinion in an area of increasing importance and one which has not as yet been directly and fully considered by it.

REASONS FOR GRANTING THE WRIT

POINT I

All details of the relationship between the attorney and client are privileged and the scope of the privilege, applicable to investigations conducted by the Internal Revenue Service, must be liberally and broadly construed in order to effectuate the public policy underlying the privilege.

The decision of the Court below would put taxpayers in peril of incrimination out of the mouth of their own attorneys by virtue of the fact that they consulted counsel. To that extent it is clearly contrary to the public policy favoring the consultation of counsel by those in need thereof.

Where legal service of any kind is sought from an attorney in his capacity as such, all communications relevant to that purpose made in confidence by the client are at the client's instruction permanently protected from disclosure by either the client or by the attorney unless that protection is waived. 8 Wigmore *On Evidence*, § 2292 (McNaughton rev. 1961). Furthermore, an attorney's communications to his client, are also within the privilege. Wigmore, Op. Ct., *supra*, § 2320.

This protection is justified by important policy consultations basic to our system of justice. In order to promote the freedom of consultation with legal advisors by a client, their apprehension of compelled disclosure by the legal advisor must be removed. Hence, the law prohibits such disclosure without the client's consent. Wigmore, Op. Cit., *supra*, § 2291. The assistance which can be rendered by an attorney ". . . can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent

statements of the skilled lawyer." *Baird* v. *Koerner*, 279 F. 2d 623 (9th Cir., 1960).

Where, as here, an attempt is made to compel an attorney to testify and produce documents within the scope of the attorney-client relationship, the attorney has the duty to respect the privilege both for the protection of his client and to prevent a sacred policy of the law from being violated. *Schwimmer* v. *United States*, 232 F. 2d 855 (8th Cir. 1956). Nor can bits and pieces be carved out of the privileged area. In advising and performing services for a client, an attorney does not function in a legal vacuum. He must take into account relevant, social economic, political and philosophical considerations which, taken by themselves, are not strictly legal in nature. The fact that such a procedure is essential to the functioning of an attorney provides no ground for restricting or limiting the privilege of non-disclosure. *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass., 1950).

The attorney-client privilege, this Court long ago held, applies to all aspects of the relationship including the nature, description and designation of the matters for which the attorney was retained. *Chirac* v. *Reinicker*, 24 Wheat. 280, 293-295, 6 L. Ed. 494, 477-478 (1826).

It is no longer subject to question that the rendition by an attorney of services in connection with income taxes is the rendition of legal services. *United States* v. *Kovel*, 296 F. 2d 918 (2d Cir., 1961). Indeed, the District Court below so held. 201 F. Supp. 13 (S.D.N.Y., 1962).

The attorney-client privilege, as Judge Metzner determined in the District Court below, of course applies to investigations conducted by Special Agents of the Internal Revenue Service. *Baird* v. *Koerner, supra; C.I.R.* v. *Schwartz*, 247 F. 2d 79 (D. C. Cir., 1957); *In re Albert Lindley Lee Memorial Hospital*, 209 F. 2d 122 (2d Cir., 1923); *McMann* v. *S. E. C.*, 87 F. 2d 377 (2d Cir., 1937); *Arend* v. *DeMasters*, 181 F. Supp. 761 (D. Ore., 1960).

However, the scope of the privilege is not determined by reference to rigid and inflexible rules. In any given case, the protection is as broad as it has to be to effectuate the policy of the privilege. The exact scope of the privilege depends upon the danger to the client from the use of information sought by the party attempting to compel disclosure and must be assessed according to the particular facts of the case in which the privilege is asserted. *Baird v. Koerner, supra.*

POINT II

The Court below erred in directing answers to be made in interdicted areas.

The Court erred in directing attorney Colton to respond to questions proffered by the Special Agents in the following interdicted areas:

a) The date or dates when specific legal services were rendered by attorney Colton on behalf of Mr. and Mrs. Matter.

b) The nature of the specific legal services, other than tax advice, rendered by Attorney Colton on behalf of Mr. and Mrs. Matter and the circumstances under which they were rendered.

c) The demand for production of documents of Mr. and Mrs. Matter, entrusted to attorney Colton in the course of his rendition of legal services in connection with the preparation of their income tax returns, to the extent in his possession.

(a) The Date or Dates When Legal Services Were Rendered by Attorney Colton on Behalf of Herbert and Mercedes Matter Are Within the Scope of the Attorney-Client Privilege Since the Same May Forge a Link in the Chain of Evidence Against the Taxpayers.

Certain of the questions directed to Attorney Colton by Special Agent Kurtzuk sought information with reference

to the specific date or dates Herbert and Mercedes Matter sought legal assistance from him (App. 64a, 71a, 77a; questions 16, 52, 54, 55 and 80). Such information is sought to furnish evidence that the alleged failure to file returns was criminally wilful.

The severe consequences of the decision below is especially noteworthy in regard to the question put by the Internal Revenue Service designated No. 80. Although the District Court Judge in this case excluded detailed inquiry into the work done and the Court of Appeals affirmed this holding, the Court of Appeals did in fact require attorney Colton to answer the following question (No. 80): "Did you or any member of your firm cause to have prepared the 1953 income tax return for them on behalf of Herbert and Mercedes Matter *in* 1954?" (Emphasis supplied)

It is clear that in an investigation conducted by Special Agents of the Internal Revenue Service of an alleged criminal failure to file timely returns, including that for 1954, the date or dates on which taxpayers under investigation sought advice from attorneys or transmitted information to attorneys in connection with their tax liability, would be of great significance. Such information is obviously useful to the Special Agent for only one purpose, namely, to ascertain whether the taxpayers wilfully failed to heed such advice and therefore wilfully failed to file timely returns. Title 26 U.S.C. Section 7203; § 7203 I.R.C. 1954. The questions directed to attorney Colton constitute a bold attempt to secure evidence of wilfullness to support a criminal charge against his clients. Certainly, the information has the same significance as did the matter of identity in *Baird* v. *Koerner*, 279 F. 2d 623 (9th Cir. 1960), and it may form the link in the chain of testimony necessary to convict Mr. and Mrs. Matter of a federal crime.

The interrogations below were conducted by Special Agents of the Internal Revenue Service and were directed solely toward the possible criminal tax liability of Herbert

and Mercedes Matter for their alleged failure to file timely income tax returns for the years 1953 through 1958. The transcripts of the examinations are replete with queries as to the times when legal services or representations were performed by attorney Colton on behalf of Mr. and Mrs. Matter.

These questions obviously do not direct themselves to oral or written utterances between attorney Colton and his clients. But such is not the limit of the word "communication." Any confidential act done by a client in the sight of his attorney may be a communication. The mere fact that these questions call for matters of general observation, or matters the knowledge about which is gained in some other way than by direct oral or written communication, is not enough to destroy the privilege. *The Continental Mutual Life Insurance Company* v. *Shields*, 18 F.R.D. 448, 450 (S.D.N.Y. 1955):

> ". . . almost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such . . . If . . . acts are done as part of a communication to the attorney, and if further the communication is intended to be confidential, the privilege comes into play." 8 Wigmore Evidence, § 2306 (McNaughton rev. 1961)

The time of their appearance in the office of the petitioners, their request for legal advice and services and the consequent rendition of it by the petitioners, must, like oral communication, be deemed intended by Herbert and Mercedes Matter to have been acts to be kept secret within the confines of the confidential relationship between attorney and client. To do otherwise would permit the Special Agent to forge a link in the chain of evidence against the taxpayers from their act of consulting counsel.

While the existence of a retainer between attorney and client may sometimes be shown, the cases which allow even this amount of disclosure "... talk in terms of the 'fact' of retention and not the ... actual terms of that retainer." *Magida* v. *Continental Can Co.*, 12 F.R.D. 74, 77 (S.D.N.Y. 1951). To this end, where the disclosure of the identity of the client might supply a link in the evidence necessary to convict the client of a federal crime, an exception arises prohibiting even the disclosure of the client's identity or the retainer itself. *Baird* v. *Koerner*, 279 F. 2d 623 (9th Cir. 1960). Holding the invocation of the privilege to be proper, the Court of Appeals in *Baird* stated:

> "The facts of the instant case bring it squarely within that exception to the general rule. Here money was received by the Government, paid by persons who thereby admitted they had not paid a sufficient amount in income taxes some one or more years in the past. The names of the clients are useful to the Government for but one purpose—to ascertain which taxpayers think they were delinquent so that it may check the records for that one year or several years. The volunteer nature of the payment indicates a belief by the taxpayers that more taxes or interest or penalties are due than the sum previously paid, if any. It indicates a feeling of guilt for non-payment of taxes, though whether it is criminal guilt is undisclosed. But it may well be the link that could form the chain of testimony necessary to convict an individual of a federal crime." (279 F. 2d at 633)

The sole function of a Special Agent of the Internal Revenue Service is to obtain evidence to support a criminal charge against the taxpayer. *Russo* v. *United States*, 241 F. 2d 285 (2nd Cir. 1957); *United States* v. *Wolrich*, 129 F. Supp. 528 (S.D.N.Y. 1955); *In re Daniels*, 140 F. Supp. 322 (S.D.N.Y. 1956).

Consonant with the view expressed in the *Baird* case, is *Miller* v. *Stern*, 262 A. D. 5, 27 N.Y.S. 2d 374 (1941), where it was held that an attorney may not be compelled to disclose his retainer or the nature of the transactions to which it relates when such information could be the basis of a suit against his client. Indeed, it was long ago decided, in *Foote* v. *Hayne*, 1 Car. and P. 545, 546 (1824), that, in proving the defendant's conduct, the fact that he had on a certain day applied to counsel to retain him was privileged.

Question 55 (App. 71a) inquires as to whether attorney Colton received remuneration from Mr. and Mrs. Matter during the years 1954 through 1957. The respondent argued below that the receipt or absence of remuneration for said years will determine whether an attorney-client relationship existed during that time, thereby determining whether the client was entitled to invoke the privilege protecting confidential communications between attorney and client. The record contains attorney Colton's undenied statement under oath that Mr. and Mrs. Matter have been his clients since the early 1940's (App. 53a).

The fact that an attorney receives no compensation for services rendered to a client does not prevent the client from imposing a duty of silence on the attorney. *Alexander* v. *United States*, 138 U. S. 353, 358, 34 L. Ed. 954, 957 (1890); *United States* v. *Funk*, 24 F. Supp. 967, 968 (E. D. Ky. 1949). Assuming *arguendo* that attorney Colton was retained by Mr. and Mrs. Matter during the years aforesaid and received no fee for his representation, the seal of secrecy with respect to confidential communications still remains. Ergo, question 55, whether attorney Colton received fees in certain years, is at best irrelevant as a factor in determining whether an attorney-client relationship existed, the argued ground in support of the question.

Question 55 thus must be considered as an attempt by Special Agent Kurtzuk to obtain indirectly what cannot be obtained directly. It seeks precisely the same informa-

tion as do questions 16, 52, 54, and 80 (App. 64a, 71a, 77a) seek, to wit: the date or dates when legal services were rendered for Mr. and Mrs. Matter by attorney Colton. The question should be stricken for the same reason.

(b) Certain Documents to the Extent That They Might Be in the Possession of the Petitioners, Are Within the Attorney-Client Privilege.

Certain questions in the examination of March 24, 1961 (App. 61a, *et seq.*) seek the production of retained copies of income tax returns, work papers, etc., relating to the preparation and filing of income tax returns on behalf of Herbert and Mercedes Matter for specified taxable years (App. 65a, 74a, questions 22 and 65).

Confidential communications between attorney and client embrace documents and papers entrusted to the attorney by the client in the course of the business for which the attorney was employed. *Blankenship* v. *Rountree*, 219 F. 2d 597 (10th Cir. 1955); *Baldwin* v. *Commissioner of Internal Revenue*, 125 F. 2d 812 (9th Cir. 1942).

If there were work papers remaining in his files, attorney Colton would properly be required to respect the clients' invocation of the attorney-client privilege to the extent of any unpublished expression made by him therein of the confidences which had passed between him and his clients. *Schwimmer* v. *United States*, 232 F. 2d 855, 866 (8th Cir. 1956), cert. den. 352 U. S. 833, 1 L. Ed. 2d 52.

POINT III

The decision below is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit.

The Court below expressly stated that it would not follow the decision of the Court of Appeals for the Ninth Circuit in *Baird* v. *Koerner*, 279 F. 2d 623 (9th Cir. 1960).

Hence the fact that a conflict does indeed exist in this crucial area can not be seriously disputed. Moreover the conflict is even more far-reaching than that conceded by the Court below. The Court of Appeals for the Ninth Circuit held that the mere fact and circumstances of retention and consultation was a privileged communication within the protection of the attorney-client privilege. The conflict thus rests in the interpretation of the Ninth Circuit in according the attorney-client privilege a broad and liberal scope in order to fully promote the free disclosure necessary to adequate representation by counsel; while the Court below unduly and severely limited the privilege, thereby placing an extreme burden on counsel and a severe hardship on taxpayers and the general citizenry seeking efficient legal representation and guidance in this important area.

CONCLUSION

For the reasons stated, the petitioners respectfully pray that the writ of certiorari be granted.

Respectfully submitted,

BORIS KOSTELANETZ,
Attorney for Petitioners.

JULES RITHOLZ,
GEORGE G. GALLANTZ,
JON H. HAMMER,
Of Counsel.

APPENDIX

Opinion of United States Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT

Nos. 316-7—September Term, 1961

(Argued April 11, 1962 Decided July 30, 1962)

Docket Nos. 26939, 27374

EDWARD E. COLTON and LILLIAN KALTMAN,
Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

UNITED STATES OF AMERICA,
Petitioner-Appellee,

v.

EDWARD E. COLTON,
Respondent-Appellant.

Before: LUMBARD, *Chief Judge*
SWAN and KAUFMAN, *Circuit Judges.*

Appeals from orders of the United States District Court for the Southern District of New York, Archie O. Dawson, J., and Charles M. Metzner, J., requiring attorneys to answer certain questions and produce certain documents before a special agent of the Internal Revenue Service in an investigation into tax liabilities of clients.

Affirmed.

Appendix.

JULES RITHOLZ, New York, N. Y. (Boris Kostelanetz, George G. Gallantz, Edward J. Daus and Corcoran Kostelanetz, Gladstone & Lowell, New York, N. Y., on the brief) *for appellants.*

MORTON L. GINSBERG, Assistant United States Attorney, Southern District of New York, New York, N. Y. (Robert M. Morgenthau, United States Attorney and Arthur S. Olick and Victor Temkin, Assistant United States Attorneys, on the brief), *for appellee.*

LUMBARD, *Chief Judge:*

These appeals raise questions concerning the propriety of a virtually complete refusal by tax counsel, primarily on the ground of the attorney-client privilege, to answer questions and produce files at an examination conducted by special agents of the Internal Revenue Service concerning the tax liability of a client. We hold that it was proper to require counsel to answer questions concerning the years during which they performed legal services and the general nature of the services. We also affirm the order requiring counsel to produce certain documents or files and to answer relevant questions concerning the nature of papers in their possession.

At some time prior to July 29, 1960, the Internal Revenue Service began an investigation into the tax liabilities of Herbert Matter and his wife, Mercedes, apparently with a view to possible criminal prosecution. On July 29, 1960, the Service served identical summonses under § 7602 of the Internal Revenue Code of 1954 upon Edward E. Colton, an attorney, and Lillian Kaltman, an attorney associated with Mr. Colton, directing them to appear in New York City before special agent Anton Kurtzuk on August

9, 1960 to give testimony and to bring with them and produce "retained copies of income tax returns, workpapers, correspondence files, memoranda and all other data relating to the preparation and the filing of Federal Income Tax Returns for or on the behalf of [the Matters] * * * covering and including the years 1951 through 1958." The appellants state, and the government does not deny, that special agent Kurtzuk informed Miss Kaltman that "he wished to question the attorneys about the reasons which the taxpayers gave their counsel for filing certain tax returns late"; an affidavit submitted by agent Kurtzuk below states the primary purpose of the investigation in similar language. The Service later consented to the adjournment of the return date of the summonses to September 21, 1960.

On September 20, 1960, the appellants obtained from the district court an order requiring the government to show cause why the summonses should not be quashed or modified and staying compliance. The appellants stated that "the subject matter of Mr. Kurtzuk's proposed inquiry would * * * so flagrantly induce a violation of their duty to the taxpayers arising out of the relationship of attorney and client that this petition was deemed necessary by the petitioners." Pending the hearing of the petition, the appellants entered into a stipulation with the government that the above quoted portion of the summonses be amended to add the phrase "except for such portions of said testimony and production that are within the attorney-client privilege." Pursuant to further terms of the stipulation the appellants appeared to testify on November 23, 1960; the stipulation provided that if the appearance was not accepted by the Service as adequate compliance with the summonses, then the petition to quash should proceed for hearing in the district court.

At the November 23 hearing, Mr. Colton and Miss Kaltman testified only that the Matters were clients of their

firm, refusing to give any substantial information as to the firm's role, if any, in preparing the tax returns in question. They had with them records of the firm pertaining to the Matters, but refused to turn them over to the agents for examination without the consent of the Matters. Virtually all of the questions asked by the agents were objected to on the basis of the attorney-client privilege.[1] Dissatisfied with the results of the hearing, the government caused the appellants' pending motion to quash to come on for hearing in the district court, on February 28, 1961. Judge Dawson denied the motion and vacated the stay without opinion, and Mr. Colton and Miss Kaltman filed their notice of appeal to this court. This appeal is now before us, designated as No. 26939.

Apparently the Internal Revenue Service requested Colton to return for further questioning and he refused. The Service on March 7, 1961 served on Colton alone a new summons in substance identical to the earlier ones as modified by the stipulation. Colton again appeared on March 24, 1961, in response to this second summons, but gave the Service no more satisfaction than he had at his first appearance, again declining on the basis of the attorney-client privilege to answer certain questions concerning tax work his firm might have done for the Matters. Accordingly, the government on June 7, 1961, applied to the district court for enforcement of this second subpoena against Colton under §§ 7402(b) and 7604 of the Internal Revenue Code of 1954, 26 U.S.C.A. §§ 7402(b), 7604. Judge Metzner granted the government's application in substance on December 28, 1961 and directed Colton to answer twenty-seven specific questions asked by agent Kurtzuk at the March 24, 1961 hearing. Colton's appeal from this order is before us in No. 27374.

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[1] It is agreed by the parties that the Matters had informed the Colton firm before any testimony was given that they did not wish to waive any privilege they had as clients.

Appendix.

With respect to No. 26939, this Court has already, on June 21, 1961, denied a motion by the government to dismiss the appeal. 291 F. 2d 487. The parties are in agreement that this appeal presents no issue of law not more specifically raised by the appeal in No. 27374, except for the question whether Judge Dawson subjected the appellants to harassment forbidden by § 7605(b) of the Internal Revenue Code of 1954, 26 U.S.C.A. § 7605(b) in permitting further examination by the Service. We hold that Judge Dawson was well within the permissible limits of discretion in not preventing further questioning under the circumstances. Indeed, Colton answered the second summons without apparent objection to being called again. Accordingly, we turn to the questions posed by No. 27374.

Colton now offers to answer by affidavit thirteen of the questions he objected to at the March 24, 1961 hearing, and the government has accepted the offer, making the appeal moot insofar as these questions are concerned. The remaining questions, all of which were objected to as infringing upon the attorney-client privilege, may be grouped under two general headings: those inquiring into the date and nature of the services performed by the Colton firm for the Matters, and those relating to the files of the firm which the Service sought to have Mr. Colton turn over to it.

At the outset, we reiterate our view, stated in In re Albert Lindley Lee Memorial Hospital, 209 F. 2d 122 (2 Cir. 1953), cert. denied, 347 U. S. 960, 74 S. Ct. 709, 98 L. Ed. 1104 (1954), that questions of privilege in a federal income tax investigation are matters of federal law. See Falsone v. United States, 205 F. 2d 734 (5 Cir.), cert. denied, 346 U. S. 864, 74 S. Ct. 103, 98 L. Ed. 375 (1953). For the reasons stated in our Albert Lindley Lee Memorial Hospital opinion, we do not agree with the Court of Appeals for the Ninth Circuit, Baird v. Koerner, 279

F. 2d 623 (1960), that a hearing held by the Internal Revenue Service under § 7602 of the Internal Revenue Code of 1954 is a "civil action" governed by state evidence law under Rule 43(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., or that state law should govern for any other reason.

1. Those questions which pertain to the date and general nature of the legal services performed by the Colton firm for the Matters should be answered as they do not call for any confidential communication. The question numbered 16 in the Internal Revenue Service's transcript of the hearing, although ambiguous,[2] appears to inquire whether in 1951 the firm performed any services for the Matters other than the preparation of income tax returns. (Colton now agrees to answer the preceding question, which asked whether or not the firm had prepared, or caused to be prepared, a 1951 tax return.) Question 18 asked Colton to state the nature of the services he admitted to having rendered the Matters in the years prior to 1951. In directing Colton to answer this question, Judge Metzner limited the required information to "general responses, such as 'litigation,' 'drafting of documents,' 'tax advice' and the like," thus excluding inquiry into specific details; since the government does not here contest this interpretation, the question remains so limited for our purposes. Questions 52 and 54 inquire whether the firm performed any legal services for the Matters during 1954, 1955, 1956 and 1957. Question 55 asks whether the firm received "any remunerations" for legal services during those four years. Finally, Question 80 asks, "Did you or any member of your firm cause to have prepared a 1953 income tax return for or on behalf of Herbert and Mercedes Matter in 1954?"

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[2] 16. Q. Did you or any member of your firm perform any services, other than the preparation of income tax returns for the year 1951 for Herbert and/or Mercedes Matter?

Appendix.

This court has accepted, and few if any lawyers would quarrel with, Dean Wigmore's statement of the basic principle underlying the attorney-client privilege:

> "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent." 8 Wigmore, Evidence § 2291 (McNaughton rev. 1961).

See United States v. Pape, 144 F. 2d 778 (2 Cir.), cert. denied, 323 U. S. 752, 65 C. Ct. 86, 89 L. Ed. 602 (1944). It cannot be seriously argued that this policy justifies any member of the bar from refusing to testify as to all transactions he may have had with any person whom he chooses to designate a "client." Thus, according to Judge Wyzanski's much quoted formulation, it must be shown that:

> "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950.)

There can, of course, be no question that the giving of tax advice and the preparation of tax returns—which unquestionably constituted a very substantial part of the legal services rendered the Matters by the Colton firm—are basically matters sufficiently within the professional competence of an attorney to make them prima facie subject to the attorney-client privilege. See United States v. Kovel, 296 F. 2d 918 (2 Cir. 1961). But, although the word "communications" must be broadly interpreted in this context, see 8 Wigmore, Evidence § 2306 (McNaughton rev. 1961), the authorities are clear that the privilege extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client. United States v. Pape, 144 F. 2d 778 (2 Cir.), cert. denied, 323 U. S. 752, 65 S. Ct. 86, 89, L. Ed. 602 (1944); Behrens v. Hironimus, 170 F. 2d 627 (4 Cir. 1958); Goddard v. United States, 131 F. 2d 220 (5 Cir. 1942); People ex rel. Vogelstein v. Warden, 150 Misc. 714, 270 N.Y.S. 362 (Sup. Ct. 1934), aff'd mem. 242 App. Div. 611, 271 N.Y.S. 1059 (1st Dept. 1934); 8 Wigmore, Evidence § 2313 McNaughton rev. 1961); McCormick, Evidence § 94 (1954). To be sure, there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communication, as where the substance of a disclosure has already been revealed but not its source. See, e. g., In re Kaplan, 8 N. Y. 2d 214, 203 N.Y.S. 2d 836, 168 N. E. 2d 660 (1960); Baird v. Koerner, 270 F. 2d 623 (9 Cir. 1960).

We find, however, no such special circumstances in the case at bar. Nor was the permissible inquiry in this regard ended when Colton stated that the Matters were his

clients and had been for some time. The principle that permits inquiry into the existence of a professional relationship obviously also permits questioning as to the years during which the relationship has continued. Thus, under the accepted doctrine, there was no basis for Colton's refusal to answer Questions 52 and 54.

For similar reasons there was no basis for Colton's refusal to state, in answer to Question 55, whether he had received any remuneration from the Matters for legal services rendered during the years 1954 through 1957. Although no question as to the relevancy of the matters inquired into is before us, we note that the government states that this question is relevant to a determination whether the attorney-client relationship actually existed, as well as to the propriety of deductions for legal fees taken by the taxpayers in their returns for those years. Such matters are surely relevant, and—in the absence of allegations as to special circumstances—we see no reason why an attorney should be any less subject to questioning about fees received from a taxpayer than should any other person who has dealt with the taxpayer. There is no further encroachment here upon any confidential relationship than there is in questioning about the existence or date of the relationship. In re Wasserman, 198 F. Supp. 564 (D.D.C. 1961). All these matters are quite separate and apart from the substance of anything that the client may have revealed to the attorney.

Moreover, a determination whether Colton rendered legal services to the Matters in a given year is proper as a basis for obtaining further unprivileged information from him. Not all communications between an attorney and his client are privileged. Particularly in the case of an attorney preparing a tax return (as the questioning agent attempted to establish Colton did for the Matters), a good deal of information transmitted to an attorney by a client is not

intended to be confidential, but rather is given for transmittal by the attorney to others—for example, for inclusion in the tax return. Such information is, of course, not privileged. 8 Wigmore, Evidence § 2311 (McNaughton rev. 1961); McCormick, Evidence § 95 (1954); e.g., United States v. Tellier, 255 F. 2d 441 (2 Cir.), cert. denied, 358 U. S. 821, 79 S. Ct. 33, 3 L. Ed. 2d 62 (1958).

It was also proper for agent Kurtzuk, in Questions 16 and 18, to inquire into the nature of the "legal services" rendered by Colton. Attorneys frequently give to their clients business or other advice which, at least insofar as it can be separated from their essentially professional legal services, gives rise to no privilege whatever. Lowy v. Commissioner, 262 F. 2d 809 (2 Cir. 1959); Olender v. United States, 210 F. 2d 795 (9 Cir. 1954); Pollock v. United States, 202 F. 2d 281 (5 Cir.), cert. denied, 345 U. S. 993, 73 S. Ct. 1133, 97 L. Ed. 1401 (1953); 8 Wigmore, Evidence § 2296 (McNaughton rev. 1961). Indeed, Colton admitted at the Service hearing that he sometimes gave "a little investment advice" to his clients. Because Colton's work for the Matters—both legal and non-legal—may thus have involved unprivileged communications with them, it is proper for the Service in its search for unprivileged matters not only to inquire into the years during which he rendered "legal services" but also to explore, as it does in Questions 16 and 18, to some extent the nature of the services rendered. These questions are appropriate to a determination of what, if any, areas may be inquired into further and what is protected by the attorney-client privilege. People's Bank of Buffalo v. Brown, 112 F. 652 (3 Cir. 1902); Steiner v. United States, 134 F. 2d 931, 934-35 (5 Cir. 1943); see United States v. Kovel, 296 F. 2d 918, 924 (2 Cir. 1961); United States v. Pape, 144 F. 2d 778, 783 (2 Cir.), cert. denied, 323 U. S. 752, 65 S. Ct. 86, 89

L. Ed. 602 (1944).[3] Judge Metzner excluded detailed inquiry into the work done. Although it would be inappropriate for us to speculate regarding those questions which might properly be asked in this area, we note that some restriction may be necessary to protect the privilege and that none of the possible responses called for by Question 18 as now limited would reveal anything which could be regarded as a communication within the meaning of the privilege doctrine. Nor do we find anything in Question 80 which calls for the revelation of any communication by the Matters.

2. The remaining questions, which pertain to documents and files, can be subdivided into two categories. The colloquy relating to Questions 22, 73, 74 and 75 reflects Colton's total refusal, on grounds of the attorney-client privilege, to produce "retained copies of income tax returns, workpapers, correspondence, memoranda and all other data pertaining to the preparation and filing of the [returns in question] * * *" and the fact that before and after the first hearing before the Service the firm had returned some of these papers to the Matters. The remaining questions inquire into the general nature of the papers presently or formerly in the firm's possession.

Judge Metzner ordered Colton to answer this last group of questions concerning the nature of the papers, and held that the privilege did not justify a blanket refusal to

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[3] Colton further argues that Question 18 is improper since it relates to events taking place in years prior to those stated in the summons to be the subject of inquiry and as to which prosecution would be barred by the statute of limitations. Evidence as to the state of the Matters' financial affairs during those years is not, however, necessarily irrelevant to prosecution for tax evasion in later years. We see no impropriety in the government's attempting to lay a basis for the possible obtaining of unprivileged information concerning those years.

produce those documents and files still in the firm's possession. He did not require Colton to make any efforts to recapture any papers no longer in the firm's possession, and the government makes no contention here that he should have. The judge apparently also held, and in any event the government now concedes, that the privilege is still available to Colton to the extent of permitting him to withhold any particular confidential papers which were "specifically prepared by the client for the purpose of consultation with his attorney" and any of the firm's memoranda and worksheets "to the extent of any unpublished expression made by an attorney therein of confidences which had passed between him and his clients."

It is self-evident that individual documents and files may still be withheld insofar as they thus are or report confidential communications between Colton and his clients, the Matters. Documentary evidence of confidentiaal communications is necessarily privileged as much as testimonial evidence. Moreover, if a proper showing is made, Colton will be able to raise the Matters' privilege against self-inerimination as a basis for refusing to produce any independently pre-existing records or other documents turned over to the firm by the Matters if the Matters could have refused to produce them under that privilege. Application of House, 144 F. Supp. 95 (N. D. Cal. 1956); 8 Wigmore, Evidence § 2307 (McNaughton rev. 1961).

Clearly Colton's blanket refusal on the grounds of the attorney-client privilege to produce anything was unjustified. As we have noted, the attorney-client privilege protects only those papers prepared by the client for the purpose of confidential communication to the attorney or by the attorney to record confidential communications, and Colton has not made the necessary showing that the papers he refused to produce are of such nature.

Appendix.

Insofar as the papers include pre-existing documents and financial records not prepared by the Matters for the purpose of communicating with their lawyers in confidence, their contents have acquired no special protection from the simple fact of being turned over to an attorney. It is only if the client could have refused to produce such papers that the attorney may do so when they have passed into his possession. 8 Wigmore, Evidence § 2307 (McNaughton rev. 1961); McCormick, Evidence § 93 (1954). Any other rule would permit a person to prevent disclosure of any of his papers by the simple expedient of keeping them in the possession of his attorney. Falsone v. United States, 205 F. 2d 734, 739 (5 Cir.), cert. denied, 346 U. S. 864, 74 S. Ct. 103, 98 L. Ed. 375 (1953).

Appellant admits in his brief that statements, correspondence, and documents received from third parties are not protected by the attorney-client privilege, and the principle is obvious. Hickman v. Taylor, 329 U. S. 495, 508, 67 S. Ct. 385, 91 L. Ed. 451 (1947); 8 Wigmore, Evidence § 2317 (McNaughton rev. 1961). He argues, however, that in any event such papers are wholly unavailable to the government under the "work product" rule which the Supreme Court in Hickman v. Taylor, supra, held justified an attorney's refusal to permit discovery in a civil case of statements obtained by him from prospective witnesses. We need not reach the government's contention that the work-product rule is inapplicable to such administrative investigations as that conducted by the Internal Revenue Service here, because Colton has made no suggestion that any of the papers involved were collected or prepared in anticipation of litigation, as must be shown to justify invocation of this rule. E. g., Rediker v. Warfield, 11 F.R.D. 125 (S.D.N.Y. 1951); Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1030 (1961).

Because Colton was unjustified in his blanket refusal to produce all of his firm's papers concerning the Matters, it was, of course, appropriate for agent Kurtzuk to question him at the hearing concerning the nature of the papers in order to determine which of them were and which were not privileged. All of the remaining questions are relevant to the government's proper attempt to uncover papers not protected under the attorney-client privilege. Questions 23, 25 and 76 have the identical purpose of trying to find out whether the firm's files contain documents received from or correspondence with third parties. We have already noted that papers received from third parties are unprivileged and no theory has been presented on which communications from an attorney to a third party are privileged. Question 65 inquires whether the firm's "papers contained retained copies of Herbert and Mercedes Matter's income tax returns" for the relevant years. Such copies would be unprivileged as not confidential, because by definition they contain no information that was not intended to be given to the Internal Revenue Service. None of these questions call for any information which could possibly reveal protected communications. Thus these questions must be answered and the materials they refer to must be produced.

The orders of the district court are affirmed.